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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	CS Docket No. 01-290
	)	
Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act	)	DOCKET FILE COPY ORIGINAL
	)	
Sunset of Exclusive Contract Provision	)	

COMMENTS OF THE RURAL INDEPENDENT COMPETITIVE ALLIANCE

The Rural Independent Competitive Alliance ("RICA") submits its Comments in response to the Federal Communications Commission's Notice of Proposed Rulemaking in the above-referenced proceeding.[1] RICA is an alliance of competitive local exchange carriers ("CLECs") operating in rural areas and affiliated with Rural Telephone Companies. Several of RICA members currently operate small, competitive cable television systems in rural areas. Other RICA members are contemplating entering the video marketplace.

The Commission initiated this rulemaking to determine whether the video marketplace was sufficiently competitive, particularly in rural and other difficult to serve areas, to warrant elimination of the statutory prohibition against exclusive contracts between vertically integrated cable operators and video programming vendors for satellite cable or satellite broadcast

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[1]Notice of Proposed Rulemaking, FCC 01-307, rel. Oct. 18, 2001.

programming contained in Section 628(c)(2)(D) of the Communications Act.[2] Congress decreed that the prohibition "sunset" on October 5, 2002, unless the FCC finds that it is necessary to preserve and protect competition and diversity in the distribution of video programming.[3]

Given the high degree of consolidation in the cable industry, the potential for harm caused by exclusive contracts between vertically integrated cable operators and programming vendors is much greater now than when the prohibition was instituted. Accordingly, the ban must be extended to preserve and protect competition and diversity in the distribution of video programming. Further, because exclusive contracts prevent new entrants from being able to compete on an equal basis with incumbent cable television providers, the Commission must expand the current prohibition to include all exclusive contracts between incumbent cable television operators and programming vendors. The Commission must also address unlawful discriminatory behavior that incumbent cable television companies have exhibited towards new entrants.

I. The Purpose of the Statute is to Provide Competitive Cable Television and Other Video Operators with Access to Cable/Video Programming on an Equal Basis.

Section 628(c)(2)(D) is one of the "program access" rules enacted as part of the Cable Television Consumer Protection and Competition Act ("1992 Cable Act").[4] The purpose of these rules was to create a more diverse video marketplace and specifically to "increase the availability of satellite cable programming and satellite broadcast programming to persons in

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2 47 U.S.C. Sec. 548(c)(2)(D).

3 47 U.S.C. Sec. 548(c)(5).

4 Pub. L. No. 102-385, 106 Stat. 1460 (1992).

rural and other areas not currently able to receive such programming . . . ."[5] Section 628(c)(2)(D) prohibits vertically integrated cable operators and video programming vendors from entering into exclusive contracts for satellite cable or satellite broadcast programming so that entities seeking to enter the video market, in competition with large cable operators would have access to cable programming on an equal basis. Congress believed that the nondiscriminatory access provision would prohibit monopolistic practices, and would level the playing field for smaller video competitors, and thereby increase the availability of cable programming or satellite programming, particularly in rural areas and other areas where such programming was not available.

Congress anticipated that ten years after it prohibited exclusive contracts, the video marketplace would have matured to the point that the prohibition would no longer be necessary to ensure a diverse market. For that reason, it limited the exclusive contract prohibition in areas served by cable operators to ten years, with the proviso that the ban could be extended if the FCC determined that it was "necessary to preserve and protect competition and diversity in the distribution of video programming."[6] If the FCC does not make that determination, the prohibition will "sunset" or expire October 5, 2002.

II. The Commission Must Continue the Prohibition Against Exclusive Contracts Between Vertically Integrated Cable Operators and Video Programming Vendors

Unfortunately, the level playing field envisioned by Congress is far from a reality. As large incumbent cable companies become huge communications enterprises through mergers, the potential for harm to competitors from the use of exclusive contracts by vertically integrated

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5 47 U.S.C. Sec. 548(a).

6 47 U.S.C. Sec. 548(c)(5).

cable operators and video programming vendors increases exponentially. In its decision approving of the merger between AT&T and Media One, the Commission found that the merger would join the nation's first, second and fourth largest cable operators giving AT&T an attributable ownership interest in cable systems serving approximately 51.3 percent of the nation's cable subscribers and a significant number of video programming networks.[7] The Commission expressed its concern that such a large cable enterprise would be able to "exercise excessive market power in the purchase of video programming" and cited comments that demonstrated that the merged company would have the potential to "command excessively large discounts or exclusive contracts from programming networks, thereby hindering competition from alternative providers of multichannel video service."[8]

The cable industry today is far more consolidated than it was when the prohibition was enacted ten years ago. As the number of affiliated companies has grown, the potential for harm to competition that can be caused from exclusive contracts between affiliated companies has grown. The sunset provision was instituted in the hopes that the opposite would be the case; yet

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[7] *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp. Transferee: Memorandum Opinion and Order*, 15 FCC Rcd 9816, 9819 (2000) ("Merger Decision"). The Commission conditioned the merger on AT&T divesting itself of interests in other cable systems such that it would have an attributable ownership interest in line with its prescribed cap on cable ownership by a set date. However, after the United States Court of Appeals for the D.C. Circuit reversed and remanded the FCC's horizontal ownership and affiliated programming limits, the Commission suspended the compliance deadline indefinitely. *Order*, CS Docket 99-251 (rel. Mar. 16, 2001).

[8] *Id.* The merger of AOL and Time Warner raises similar concerns, as well as the possibility that other mergers could occur in the near future. *See, e.g.*, "Discovery, NBC Held Merger Talks During Summer," *Wash. Post*, Nov. 27, 2001 (reporting that Discovery Communications, Inc. and NBC held negotiations regarding a possible merger and noting that two of the major shareholders of Discovery Communications are Liberty Media Corp and Cox Communications).

Congress provided a way to extend the prohibition in the event that competition was not sufficiently developed. Accordingly, because competition needs continued preservation and protection from the harm that can be caused by exclusive contracts between affiliates, the prohibition must be continued.

III. The Commission Must Expand the Current Prohibition to Include all Exclusive Contracts Between Incumbent Cable Television Providers and Programming Vendors

Exclusive arrangements between affiliated providers and programmers are not the only obstacle to program access and competition in rural video markets. Large, well-entrenched incumbents that have exclusive contracts with unaffiliated programming vendors are able to prevent new entrants from competing in a meaningful way. The inability to provide similar programming not only deters new customers from signing up with the competitor but also is the main reason why some customers return to the incumbent.

Notably, Section 621(a)(1) of the Communications Act[9] prohibits local franchising authorities from awarding exclusive cable franchises. That provision states in pertinent part, "...a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise...." The exclusive franchise prohibition was intended to promote a competitive video marketplace. For the same reason, the Commission should prohibit exclusive agreements between programming vendors and cable/video operators.

RICA members serve rural areas, where traditionally, competition has been limited.[10] Yet RICA members seeking to provide video services in rural markets report that they are being

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9 47 U.S.C. Sec. 541(a)(1).

10 In many instances, the cable/video operations of the RICA members are the only meaningful competition being provided in the rural areas.

shut out because cable programming, such as Disney, Warner Brothers, Fox, Midwest Sports, ESPN, TV Land, and MSNBC is not available to them. In several instances, they report that they cannot obtain critical programming because it is being offered to an established video provider in the market under an exclusive arrangement.

Not surprisingly, the inability to offer such programming makes a difference in whether subscribers sign up for a RICA member's competitive service, or discontinue service. For example, RICA members denied access to local entertainment or sports programming often cannot attract subscribers in an area, and thus are unable to gain a foothold in the market. Several RICA members report that Disney programming was not available to them because the large, incumbent cable operator serving the area had an exclusive contract for Disney programming in that area. One RICA member reported that it was forced to remove MSNBC and TV Land from its lineup after it had initiated service due to the existence of exclusive contracts that existed between the incumbent and an unaffiliated video programmers. This new entrant was not only stifled in its growth as it sought to attract new subscribers, but also was stifled in its ability to keep its current subscribers as they were forced to return to the incumbent to receive the channels that had to be removed due to the existence of the exclusive programming contract.

Because exclusive contracts between incumbent cable operators and program vendors significantly disadvantage new entrants, the prohibition on exclusive contracts between vertically-integrated programmers and cable operators should be expanded to include exclusive contracts between incumbent cable operators and unaffiliated programming vendors.

IV. Other Discriminatory Behaviors Must be Addressed

Discriminatory practices in video program distribution appear to be ongoing, notwithstanding Section 628's goals of increasing "the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming . . . ."[11] These anti-competitive practices make it extremely difficult for small cable/video operators to compete, on an equitable basis, in an area served by well-entrenched incumbent cable operators. Accordingly, the Commission must address these and other unfair practices, which are in violation of Section 628(b)'s prohibition against discriminatory behavior.

RICA members report that they are charged a much higher rate for the same cable or satellite programming, which effectively denies them an opportunity to compete. One member was quoted a rate for programming that was $20 higher than the rate the incumbent operator was charged. Moreover, larger entities operating in numerous markets are able to subsidize their operations in less competitive markets, making it difficult, if not impossible, for new entrants to compete. Programming discounts that are based on the number of subscribers compound the advantages that larger, incumbent video operators enjoy. To prevent this discriminatory pricing, RICA urges the Commission to require that programming vendors offer new entrants the same rates that are being offered to the incumbent.

The obstacles of program access and price differentials are further compounded by the program exclusivity arrangements permitted under the FCC's signal carriage rules, which

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[11] *See* cite *supra* note 5.

prevent RICA members from carrying programming that is within their subscribers' community of interest. Such programming can be critical to the viability of a competing provider.

Moreover, some RICA members have reported that they are unable to obtain the digital service offerings provided by AT&T through its "HITS2HOME" product unless they agree to not offer the services in areas where AT&T provides cable service. According to its web page, "HITS2HOME" is a new cable satellite overlay product that allows a cable operator with a small system to deploy digital cable television by providing over 140 digital channels to current subscribers of the analog cable system via a satellite dish.[12] AT&T's restriction against allowing competing cable operators to provide its product, which delivers over 140 digital channels in areas where AT&T affiliates provide service is certainly in violation of Section 628(b), which states that it is unlawful for cable operators to engage in "unfair methods of competition . . . the effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers."[13]

V. Conclusion

Allowing the exclusive contract prohibition contained in Section 628(c)(2)(D) of the Communications Act to expire is not in the public interest. Congress wisely afforded the FCC the opportunity to examine the status of competition in the video market, particularly in rural areas, where video competition is slow to emerge, in order to determine whether lifting the exclusive contract prohibition served the public interest. As the number of affiliated cable

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[12] *See* www.HITS.com/hits_tech_home01.html. The web page lists Special Interest channels, PPV, Sports PPV, DMX and Premium Multiplexes as some of the program offerings.

[13] 47 U.S.C. § 548(b).

operators and companies providing cable/video programming have grown, the public interest would indeed be served by extending the prohibition for at least five years or until discriminatory practices have abated and the video market is truly competitive.

Indeed, greater enforcement of this prohibition is needed. The FCC should strenuously pursue enforcement action against any video providers or programmers involved in exclusive arrangements that result in anti-competitive behavior. In order to bring about real competition and diversity in the video marketplace, there must be greater accountability, and penalties should be assessed.

Further, RICA members, seeking to compete in the video market, are being thwarted by exclusive arrangements between large unaffiliated cable television incumbents and video programmers, discriminatory rates and other discriminatory practices. Accordingly, the prohibition on exclusive contracts set forth in Section 628(c)(2)(D) should be expanded to include exclusive contracts between unaffiliated cable operators and programming vendors. Additionally, the Commission should take whatever remedial measures are necessary to combat discriminatory practices that are curtailing competition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Naomi Adams, of Kraskin, Lesse & Cosson, LLP, 2120 L Street, NW, Suite 520, Washington, DC 20037, do hereby certify that a copy of the foregoing "Comments of the Rural Independent Competitive Alliance" was served on this 3rd day of December 2001, via hand delivery to the following parties:

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